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In the
Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* TOWN OF ISLIP, TOWN OF BROOKHAVEN, TOWN OF SMITHTOWN, TOWN OF HUNTINGTON and TOWN OF OYSTER BAY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are contiguous town governments located in New York State, serving a combined total population of approximately 1,300,000 persons, covering roughly 730 square miles.

The estimated population of the *amici curiae* are as follows: Town of Islip (300,000); Town of Brookhaven (400,000); Town of Smithtown (150,000); Town of Huntington (200,000); and Town of Oyster Bay (300,000).

The *amici curiae* are responsible for a wide range of municipal affairs and local governance over diverse matters of public interest, including local zoning authority over the placement of cellular phone towers within their jurisdiction, together with primary responsibilities for local zoning and planning matters commensurate with their municipal charters and applicable State and Local Laws.

The N.Y. Town Law expressly confers upon the *amici curiae* and their town boards broad zoning powers to regulate the size, use and location of buildings, structures and land "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community." N.Y. Town L. Sec. 261 (McKinney's Supp. 1990).

The *Telecommunications Act of 1996* commandeers the *amici curiae* to administer an unconstitutional system which strips them of their local zoning powers to address the health, safety and welfare of their citizens — i.e., Euclidian zoning

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[1] This brief is submitted pursuant to Rule 37.4 of the Rules of this Court by and on behalf of the designated towns and town attorneys, who are authorized law officers.

powers[2] traditionally reserved for the states and local government.

The *amici curiae* are uniquely situated to complain of the erosion of their local zoning powers. In the face of an awesome explosion of cellular phone towers, town boards and zoning boards of appeal have been rendered powerless to resort to traditional zoning and planning measures — e.g., considerations of alternative sites based upon health, safety or welfare concerns, including proximity to schools and densely populated residential areas. As a result of the *Telecommunications Act*, the *amici curiae* are now impotent to address the legitimate concerns of angry and bewildered citizens who rightfully ask why their local governments are powerless to address their health, safety and welfare concerns at the local level.

SUMMARY OF ARGUMENT
REASONS FOR GRANTING CERTIORARI

Foremost, the *amici curiae* contend that certiorari should be granted in order to declare the *Telecommunications Act of 1996* unconstitutional under the Tenth Amendment, and thereby restore to the *amici curiae* their local zoning powers traditionally reserved for the states and local government.

The *Telecommunications Act of 1996* requires the *amici curiae* to grant a plethora of local zoning applications regarding the siting and construction of cellular phone towers — e.g., change of use permits; rezoning proposals; site plan approvals . . . etc. — all without due regard for the myriad health, safety and welfare concerns associated therewith.

In so doing, the *Telecommunications Act* deprives the *amici curiae* of their ability to rely upon traditional zoning and

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[2] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

planning measures — e.g., considerations of alternative sites based upon proximity to schools and densely populated residential areas — to address local health, safety and welfare concerns.

At the same time, the *amici curiae* have been faced with an alarming boom in applications for the siting and construction of cellular phone towers — and predict unparalleled growth in the coming years.

Since the passage of the *Telecommunications Act*, town boards and zoning boards of appeal are now repeatedly confronted with this all too familiar scenario:

> A cellular phone company (i.e., the applicant) applies for a local zoning permit in order to build a cellular phone tower in close proximity to a local grade school. Concerned citizens flock to the public hearing to voice their concerns over potentially adverse health consequences. They convincingly urge both the applicant and the local zoning board to consider an alternative location, and to consider the potentially adverse health effects which may result from the placement of a cellular phone tower in close proximity to the grade school.

Under the *Telecommunications Act*, the local zoning board in the above scenario is often hamstrung to stifle public participation, and to mechanically grant the application. The cellular phone company holds all the cards. If the local zoning board takes into consideration any of the myriad health, safety or welfare concerns raised by its citizens, then the applicant will simply bring suit under the *Telecommunications Act* to compel the issuance of the permit by the local board. *See, e.g., Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999). Even mentioning the potentially adverse health effects associated with cellular phone towers gives the applicant cause to challenge an adverse zoning

decision in court. *Id.* The normal breadth of public discourse and democratic processes suffer greatly.

The *amici curiae* have been subjected to repeated and growing complaints by their alarmed electorate who express anger and dissatisfaction over the silencing effect which the *Telecommunications Act* has engendered, and the inability of their town governments to respond to their concerns, while the FCC and the federal government remain distant bodies. *See New York v. United States*, 505 U.S. 144, 169 (1992) (inviolable principles of dual sovereignty are compromised where "state officials . . . bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision").

In a stunning blow to the Tenth Amendment, the *amici curiae* have all at once been commandeered by the *Telecommunications Act* and disenfranchised from their own electorate. *See id.*

Certiorari is thus warranted to restore the *amici curiae's* local zoning and planning powers, and to restore voice and reason to their local electorate.

Certiorari is also warranted to address the conflict between the Second Circuit (in this case) and the Fourth Circuit over the constitutionality of the *Telecommunications Act of 1996*.[3] *See Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688,705-06 (4th Cir. 2000) (concurring opinion):

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[3] Last term, on writs of certiorari, this Court examined several rule-making challenges to the *Telecommunications Act of 1996* asserted by state utility commissions and incumbent telephone local exchange carriers. *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The constitutional questions and public policy implications of this case are far more profound.

through a compromise involving a partial preemption approach, [Congress] enacted §704(a) of the Telecommunications Act, imposing federal standards on state and local legislative processes, thus leaving state and local legislative boards responsible and accountable for any fall-out in making siting decisions. Through this blend of assigned power, Congress apparently believed it could effect a federal policy promoting the erection of telecommunications towers, while preserving local interests in the process. But this particular blend erases the constitutional lines dividing power between the federal and state sovereigns and therefore becomes a categorical violation of the Tenth Amendment.

ARGUMENT

THE TELECOMMUNICATIONS ACT OF 1996 USURPS THE LOCAL ZONING POWERS TRADITIONALLY RESERVED FOR THE STATES AND LOCAL GOVERNMENT

The *Telecommunications Act of 1996* strikes a severe blow to the governmental sovereignty of the *amici curiae*.

As witnessed first hand by each of the *amici curiae*, local town boards and zoning boards of appeals have been driven to stifle public participation in local zoning matters, and have been forced to grant a growing number of applications for the indiscriminate placement and construction of cellular phone towers without due regard for the health, safety and welfare of their own electorate.

47 U.S.C. Sec. 332(c)(7)(B)(iv) provides, in relevant part:

No state or local government or instrumentality thereof may regulate the placement, construction or modification of personal wireless service facilities on the basis of

the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such facilities.

The Federal Communications Commission has promulgated implementing regulations which, among other things, fail to take into consideration *any* environmental effects other than "thermal effects" from radiation (i.e., as distinguished from non-thermal or "biological effects" associated with cancer and other diseases). In fact, despite the "partial preemption" (*Petersburg, supra*, at 705) by Congress and the FCC in this area, Congress has utterly failed to fund EPA research into the biological effects associated with cellular phone towers and related facilities.[4]

In *New York v. United States*, this Court recognized and adhered to the inviolable sovereignty belonging to the states and local government rooted in the Tenth Amendment. 505 U.S. 144 (1992). This Court's recent Tenth Amendment decisions in *Alden v. Maine* and *Printz v. United States* likewise adhere to the fundamental importance of dual sovereignty. *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997).

As emphasized in *New York*, under the Tenth Amendment, Congress may not commandeer the states and local governments to "enact and enforce a federal regulatory program," (*New York*, 505 U.S. at 151, *quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). Nor may the federal government intrude upon the "residuary and inviolable sovereignty" retained by the states under the Constitution. *Alden*, 527 U.S. at 715 (*quoting The Federalist* No. 39 at 245). Stated differently, a congressional act which threatens to "compromise the structural framework

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[4] We respectfully refer to the main petition filed by Citizens for the Appropriate Placement of Telecommunications Facilities, et al.

of dual sovereignty" is "categorically" unconstitutional and "no comparative assessments of the various interests [involved] can overcome that fundamental defect." *Printz*, 521 U.S. at 932-33.

Applying these principles, the *Telecommunications Act* strikes an unacceptable balance of power between the federal government and the *amici curiae*. Although cloaked in the garb of "compromise," the *Telecommunications Act* in reality commandeers the *amici curiae* to administer a federally-mandated program which deprives the *amici curiae* of their ability to address important matters of public concern at the local level. Rather than promote dual sovereignty, the *Telecommunications Act* merely erodes it. Worse still, the *Telecommunications Act* stifles public participation and shackles local town boards and local zoning boards of appeal by rendering them impotent to address the legitimate health, safety and welfare concerns of their electorate.

For all of these reasons, certiorari should be granted to remedy the constitutional infirmities which beset the *Telecommunications Act of 1996*, and to preserve dual sovereignty under the Tenth Amendment.

CONCLUSION

The Petition for Certiorari should be granted.

Dated: Garden City, New York
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